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Supreme Court of the United States

October Term, 1941

Nos. ~~819, 885~~ 720

IN THE MATTER
of
THE WESTERN PACIFIC RAILROAD COMPANY,
a corporation,
Debtor,

FREDERICK H. ECKER, JOHN W. STEDMAN and REEVE SCHLEY, constituting the INSTITUTIONAL BONDHOLDERS COMMITTEE,
Petitioners,
vs.
WESTERN PACIFIC RAILROAD CORPORATION, a corporation; A. C. JAMES CO., a corporation; THE RAILROAD CREDIT CORPORATION, a corporation; THE WESTERN PACIFIC RAILROAD COMPANY, a corporation; IRVING TRUST COMPANY, a corporation, as substituted Trustee under the General and Refunding Mortgage of Western Pacific Railroad Company; RECONSTRUCTION FINANCE CORPORATION; and CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under the First Mortgage of The Western Pacific Railroad Company, a corporation,
Respondents.

PETITIONERS' REPLY BRIEF,
MEMORANDUM IN OPPOSITION TO MOTION OF RESPONDENT IRVING TRUST COMPANY TO DEFER CONSIDERATION OF PETITION FOR CERTIORARI
and
MEMORANDUM IN REPLY TO CROSS-PETITION OF THE DEBTOR FOR A WRIT OF CERTIORARI

ROBERT T. SWAINE,
Attorney for Petitioners.

HERBERT W. CLARK,
Of Counsel.

January 23, 1942.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully request leave to file the attached (1) brief in reply to the briefs submitted by respondents Western Pacific Railroad Corporation, A. C. James Co. and The Railroad Credit Corporation in opposition to the petition for certiorari, (2) memorandum in opposition to the motion of respondent Irving Trust Company to defer consideration of the petition and (3) memorandum in reply to the Debtor's cross-petition.

REPLY BRIEF

I. THE DECISION OF THE SEVENTH CIRCUIT IN THE *MILWAUKEE* CASE, AS TO THE ADEQUACY OF THE ICC FINDINGS OF ABSENCE OF VALUE, IS IN SQUARE CONFLICT WITH THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS IN THE INSTANT CASE.

Various respondents urge that the instant decision and that of the Seventh Circuit in *In re Chicago, Milwaukee, St. Paul & Pacific R. R.* (unreported, December 4, 1941) are identical in reasoning and "arrived at the identical result".[1] They accuse your petitioners of straining "to create an appearance of conflict"[2] which one respondent is "unable to see"[3].

Upon a motion by the Milwaukee Preferred Stockholders Committee requesting the Seventh Circuit Court of Appeals to modify its December 4, 1941, opinion to bring that opinion into full accord with that in the Ninth Circuit in the instant case, the Court, in a memorandum filed January 12, 1942 (printed as an appendix hereto), said:

> "Because counsel seemingly misunderstand our position upon the failure of the Commission to make necessary findings of value so as to allocate the new securities amongst existing bondholders and creditors, we deem it necessary, or at least advisable, to make our position clear.
>
> * * * * * * * *
>
> "Now, to make our position entirely clear, we add this memorandum and hold that the finding of the I. C. C. as to absence of value of old common and preferred stock, is specific, definite and certain,

---

[1]ACJ brief, p. 9. [2]ACJ brief, p. 11. [3]RCC brief, p. 7.

and fully meets the rule which requires finding on values of assets."

If the Seventh Circuit is correct in this ruling, the Ninth Circuit must necessarily be wrong[1] in holding inadequate the Commission's negative findings (1) that the Debtor's stock is without value, (2) that the claims of the Debtor's unsecured creditors are without value, and (3) that the second lien equity of RCC in the collateral pledged with RFC is without value.

Until this Court settles the irreconcilable conflict between these two decisions, the District Courts in the Seventh and Ninth Circuits must work at cross purposes in administering the railroad reorganizations in their charge, and the District Courts in other Circuits and the Interstate Commerce Commission will be wholly at a loss to know which of the two conflicting Court-pronounced methods they themselves should follow.

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[1]Respondent WP Corp. has, in the appendix to its brief, endeavored to distinguish the two decisions on the basis of an asserted difference in fact—that the increase in Western Pacific earnings since the date of the Commission Plan has been "vastly greater, relatively, than that relied on by the stockholders in the Milwaukee case". Increases enjoyed by the two roads are compared in terms of percentages which are meaningless except to establish that the rise in Western Pacific earnings began at a point closer to zero dollars than the rise in Milwaukee earnings. Even on the basis of the asserted $2,958,189 of earnings for the first nine months of 1941 (which makes allowance neither for the subsequent wage increase nor for probable tax liabilities), the earnings of the Western Pacific would have to be capitalized at the rate of 4.5% to produce a dollar value in excess of $87,981,672, the dollar figure below which the interests of WP Corp. would necessarily be without value.

However, war-inflated earnings can hardly be a sound foundation for permanent railroad capitalization, a point which this Court may well accent in any ultimate decision in the instant case.

II. THE PETITION FOR CERTIORARI IS NOT PREMATURE MERELY BECAUSE THE DECREE OF THE CIRCUIT COURT OF APPEALS IS INTERLOCUTORY OR BECAUSE THE SECURITYHOLDERS HAVE NOT VOTED ON THE COMMISSION PLAN.

Respondent ACJ contends that the petition for certiorari is premature because the plan of reorganization has not yet "had full consideration by the Commission, by the District Court, and by the Circuit Court of Appeals",[1] and for the further reason that the securityholders have not yet voted on the Commission Plan.

All of the questions involved in this reorganization have had "full consideration by the Commission and by the District Court" and have been decided by those bodies. All the issues presented to, but left undecided by, the Circuit Court of Appeals are clear-cut questions of law, involve no complicated or disputed questions of fact and can readily be decided by the Court at the present time on the present record. None of the further proceedings which respondents say should be had before any decision by the Supreme Court would render any of these issues moot. In truth such further proceedings—as well as many other pending railroad reorganization proceedings—will be a waste of the time and money of everyone (securityholders, Interstate Commerce Commission and Courts) until the questions involved in the instant case are decided by this Court. If the Ninth Circuit Court of Appeals is wrong in its decision in the *Western Pacific* case, the time to find out is now, before years of time and millions of dollars are spent in unnecessary dollars and cents valuation proceedings.

Respondents' contention that an appeal or a petition for certiorari may not properly be taken to review, respectively,

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[1] ACJ brief, p. 19.

a District Court order "approving" a Section 77 plan, or a Circuit Court of Appeals decree reversing that order, merely because creditors have not yet voted upon the plan, goes only to establish that the decree of the Circuit Court of Appeals is not a "final judgment", but is interlocutory only[1].

Petitioners do not contend that the decree of the Ninth Circuit Court of Appeals is anything but interlocutory. However, the certiorari jurisdiction of this Court extends to interlocutory decisions of Circuit Courts of Appeals (as none of the respondents has denied) and the present case is a particularly suitable one for the exercise of that discretionary jurisdiction.[2]

Numerous important recent decisions of this Court on bankruptcy and reorganization matters have been written on certiorari to review similar interlocutory orders.[3] More-

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[1]Bankruptcy Act § 77(e) [11 U. S. C. § 205(e)] provides that the judge shall "approve" the plan. Section 24 b (11 U. S. C. § 47 a) gives the Circuit Courts of Appeals appellate jurisdiction to review interlocutory, as well as final orders entered in bankruptcy proceedings. Section 24 c (11 U. S. C. § 47 c) gives the Supreme Court power to review all "judgments, decrees, and orders" entered by Circuit Courts of Appeals.

[2]Cases in which the power to review interlocutory orders of Circuit Courts of Appeals has been specifically discussed and specifically exercised include *Forsyth* v. *Hammond*, 166 U. S. 506, 511-515 (1897); *Denver* v. *New York Trust Co.*, 229 U. S. 123, 133 (1913); *Union Pacific R. R.* v. *Board of County Commissioners*, 247 U. S. 282, 284 (1918); *Hanover Star Milling Co.* v. *Metcalf*, 240 U. S. 403, 408 (1916); *Gay* v. *Ruff*, 292 U. S. 25, 30 (1934); *Spiller* v. *Atchison, T. & S. F. Ry.*, 253 U. S. 117, 121 (1920); *United States* v. *Gulf Refining Co.*, 268 U. S. 542, 545 (1925).

[3]*E.g.*, *Adair* v. *Bank of America National Trust & Savings Ass'n*, 303 U. S. 350 (1938); *Consolidated Rock Products Co.* v. *Du Bois*, 312 U. S. 510 (1941); *In re 620 Church Street Building Corp.*, 299 U. S. 24 (1936); *Sampsell* v. *Imperial Paper & Color Corp.*, 313 U. S. 215 (1941).

over, the number of cases in which this Court has granted certiorari "solely because a Circuit Court of Appeals has required further findings from an administrative agency"[1] are legion.[2]

MEMORANDUM IN OPPOSITION TO MOTION OF IRVING TRUST COMPANY

Respondent Irving Trust Company, the Refunding Mortgage Trustee, has moved that consideration of the petitions[3] for certiorari be deferred "until after the decision by the Circuit Court of Appeals for the Ninth Judicial Circuit of petitions for rehearing of the decision to which said petitions for certiorari are directed", and has also asked that its time for filing a brief in this Court be extended until twenty days "after the decision of its said petition for rehearing".

Petitioners submit that this motion should be dismissed for the following reasons:

1. *Standing of Refunding Trustee in this Court.* The decree of the Ninth Circuit Court of Appeals dismissed the appeal of Irving Trust Company, as the Refunding Mortgage Trustee.[4] Neither of the petitions for certiorari seeks

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[1] ACJ brief, p. 20.

[2] *E.g., Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470 (1940); *National Labor Relations Board* v. *Bradford Dyeing Ass'n*, 310 U. S. 318 (1940); *United States* v. *Louisiana*, 290 U. S. 70 (1933) (statutory 3-judge court); *Meeker & Co.* v. *Lehigh Valley R. R.*, 236 U. S. 412 (1915).

[3] The petitions in this case (No. 819) and the companion case (No. 820) in which certiorari is requested by the First Mortgage Trustees.

[4] All the holders of Refunding Mortgage Bonds (RFC, RCC and ACJ) are parties in the proceeding and respondents upon the petitions for certiorari.

to review that dismissal. While Irving Trust Company is named as a respondent in the petitions for certiorari because your petitioners believed that it was not for them to decide the right of Irving Trust Company to appear as a respondent in this Court, Irving Trust Company has now placed squarely before this Court the issue of its right to be a respondent party to these Supreme Court proceedings, and to address any motions to this Court.

2. *Propriety of the motion at this time.* Irving Trust Company has filed no brief in opposition to the petitions. Its motion to defer consideration of the petitions until its application for rehearing is passed upon by the Ninth Circuit Court of Appeals is, in practical effect, a motion to *dismiss* the petitions for certiorari without prejudice to the filing of another petition on the same papers after the Ninth Circuit Court of Appeals has acted on the application for rehearing.

Rule 7 of the Rules of this Court provides:

> "3. No motion by respondent to dismiss a petition for writ of certiorari will be received. Objections to the jurisdiction of the court to grant writs of certiorari may be included in briefs in opposition to petitions therefor."

Your petitioners therefore submit that Irving Trust Company's motion should be dismissed as improper in form.

3. *Power of this Court to entertain the certiorari petition.* Irving Trust Company implies (at pp. 10-11 of its motion) that this Court is without jurisdiction to entertain a petition for certiorari if an application for rehearing is pending in a Circuit Court of Appeals. The cases it cites in support of this apparent contention were all decided at times when the jurisdiction of the Supreme Court to review

decisions of the particular lower courts involved was limited to cases in which a final judgment had been rendered.[1] Each of these cases, and many other decisions applying the same rule, proceeded on the theory that until the application for rehearing had been passed upon the lower court judgment was not final but interlocutory, and outside the statutory jurisdiction of this Court.

Since the passage of the amendments to the Judicial Code in 1891, certiorari jurisdiction of the Supreme Court over the decisions of the Circuit Courts of Appeals has not been limited to final judgments, and this Court has held:

> "that the power may be exercised before, as well as after, any decision by that court [Circuit Court of Appeals] and irrespective of any rule or determination therein; and that the sole essential of this Court's jurisdiction to review is that there be a case pending in the circuit court of appeals." [*Gay* v. *Ruff, supra,* 292 U. S., at p. 30.]

Since the passage of the 1925 amendments to the Judicial Code, this power has been plainly conferred by statute (Judicial Code, Section 240, 28 U. S. C. § 347; 43 Stat. 938).

4. *Reasons why this Court should exercise its discretion to entertain the certiorari petition notwithstanding the pen-*

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[1] *Wolff Packing Co.* v. *Industrial Court*, 267 U. S. 552 (1925), involved a writ of error from a *state* court decision, and was governed by the "final judgment" requirement of Judicial Code § 237 (a), 28 U. S. C. § 344 (a), and its predecessors. *Cherokee Nation* v. *Whitmire*, 223 U. S. 108 (1912), and *Voorhees* v. *Noye Manufacturing Co.*, 151 U. S. 135 (1894), involved appeals from the Court of Claims and the old Circuit Court, respectively, and were governed by the requirements embodied in Judicial Code §§ 242, 243 [36 Stat. 1157-(1911)], repealed by 43 Stat. 941 (1925), and Rev. Stat. § 691, repealed by 26 Stat. 829 (1891).

dency of the Refunding Mortgage Trustee's petition for rehearing below. As early as 1893, when petitions for certiorari were the exception rather than the rule, and when finality was the controlling consideration on the more usual writs of error and appeals, this Court said:

> "But the question at what stage of the proceedings, and under what circumstances, the case should be required, by *certiorari* or otherwise, to be sent up for review, is left to the discretion of this court, as the exigencies of each case may require." [*American Construction Co.* v. *Jacksonville Ry.*, 148 U. S. 372, at p. 385 (1893).]

Your petitioners submit that the pendency of the rehearing petition below should not deter this Court's exercise of its discretionary power to grant certiorari:

(a) Petitions for rehearing in the Ninth Circuit Court of Appeals were filed by two appellants in that court whose appeals to that Court had been dismissed by the Ninth Circuit decree. Your petitioners did not join in such petitions for rehearing, nor did they file any memorandum in opposition thereto.

Good cause might exist for refusing to exercise the discretionary certiorari jurisdiction of this Court in favor of a litigant[1] who was simultaneously pursuing a different remedy—such as an application for rehearing—in the Circuit Court of Appeals. But your petitioners have done nothing to prejudice their right to relief before this Court and they respectfully submit that none of the issues or questions involved in the petition for certiorari can or will be affected by the outcome of the rehearing applications instituted by two of the respondents.

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[1]Such as the Debtor.

Although Irving Trust Company's application for rehearing not only asks reconsideration of its status as an appellant in the Circuit Court of Appeals, but also requests that court to reverse the District Court's decision of the lien questions between the First Mortgage and the Refunding Mortgage on the merits, these lien questions cannot fairly be said to have been put before the Circuit Court of Appeals by Irving Trust Company's application for rehearing. As a dismissed would-be appellant in the Circuit Court of Appeals, Irving Trust Company has no right to ask that court to pass on any question on the merits until it is first reinstated as an appellant. Until such reinstatement is accorded to Irving Trust Company—the earliest date at which it may properly urge the Circuit Court of Appeals to decide the lien questions—its motion addressed to this Court should be dismissed.

(b) Irving Trust Company, as the Refunding Mortgage Trustee, is a fiduciary representing only three persons —RFC, RCC and ACJ—who hold as collateral for the Debtor's Notes all of the Refunding Bonds. All three are themselves parties in the reorganization proceeding, have been represented by counsel and have filed briefs before the Commission, the District Court and the Circuit Court of Appeals. Since RFC has supported the Commission Plan,[1] Irving Trust Company, as a practical matter, is acting only as the *alter ego* of RCC and ACJ.

If a decision by the Circuit Court of Appeals on the lien questions had been the primary objective of any rehearing application, it would not have been necessary to ask the Circuit Court of Appeals, as a preliminary matter, to

[1]Your petitioners are advised that RFC has itself filed, or expects shortly to file, its own petition for certiorari in the instant case.

reconsider the perplexing problem of the right of a mortgage trustee to appeal when all of his *cestuis* are parties and represent themselves before the court. Since these *cestuis* themselves had the right to request a rehearing before the Circuit Court of Appeals and remained silent, Irving Trust Company, as their representative, can hardly be heard in this Court to urge the inconvenience to their interests resulting from a refusal by this Court to wait upon the outcome of the petitions for rehearing.

Against this imaginary inconvenience to RCC and ACJ, which they themselves made no effort to avoid, stand the interests of senior creditors[1] holding $52,253,100 of the Debtor's securities on which they have received no interest for more than eight years, and the interests of all railroad bondholders. All parties sincerely interested in the expedition of this and other railroad reorganizations anxiously await an early Supreme Court decision so that this and all other pending reorganizations may proceed intelligently.

Whatever may be the motive of the Refunding Trustee, the effect of its success in obtaining a rehearing in the Circuit Court of Appeals and deferring review in this Court until after decision on such rehearing would only be to add at least another year to the already too many years by which the junior interests have succeeded in delaying the Western Pacific reorganization.

(c) The contention of Irving Trust Company that the lien questions adjudicated by the Commission and the District Court must in any event be resubmitted to the Circuit Court of Appeals for decision, even if the certiorari petition is entertained and the decree of the Circuit Court of Appeals reversed, is wholly unsound, and does not

[1]The First Mortgage Bondholders and RFC.

support the claim that the whole proceeding will therefore be expedited by awaiting the decision on rehearing.

In *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555 (1931), this Court dealt with an identical problem. Reversing a judgment of the Circuit Court of Appeals and reinstating the judgment of the District Court, the Supreme Court passed on several assignments of error in the Circuit Court of Appeals made there by the Supreme Court respondent in his successful attack on the District Court judgment, including several assignments of error which were not discussed by the Circuit Court of Appeals when it decided in his favor. The Supreme Court said (at pp. 567-8):

> "Other assignments of error made on the appeal from the district court were not considered by the court below. No argument in support of these assignments has been submitted here, and respondents assume that they will be remitted for the consideration of the court below if the judgment of that court be reversed. The entire record, however, is before this court with power to review the action of the court of appeals and direct such disposition of the case as that court might have made of it upon the appeal from the district court. *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U. S. 257, 267; *Delk* v. *St. Louis & S. F. R. Co.*, 220 U. S. 580, 588. And see *Langnes* v. *Green, supra* [282 U. S. 531]. Accordingly, we have examined these assignments, some eight in number. One or more of them involve questions which have been disposed of by the foregoing opinion. We find nothing in any of the others of sufficient substance or materiality to call for consideration."

To the same effect is *Cole* v. *Ralph*, 252 U. S. 286, 290 (1920).

MEMORANDUM IN REPLY TO CROSS-PETITION OF THE DEBTOR (No. 885)

It may be desirable that in connection with the review of all the substantive issues in the instant case, this Court should also, as urged by the Debtor, consider the status of a debtor corporation all of whose stockholders are themselves parties to the proceeding.

But three features of the Debtor's cross-petition sharply accentuate the necessity that this Court's review should not be limited to this one question:

1. The Debtor lists, under five sub-headings (pp. 3, 4), a mass of statistical and philosophical findings which it insists must be made to render adequate a fundamental finding that a debtor's stock is without value. Your petitioners believe that the Debtor's bare statement of the requirements which it would impose upon the Commission and the securityholders, shows the impossibility, if not the absurdity, of the alleged requirement. However, if there is any such requirement the Commission and the senior securityholders should know it now in order that they may, after the many years which such a requirement would consume, finally perfect a valid plan. If there is no such requirement everyone should be spared the effort and expense involved in trying to meet it.

2. The Debtor's attack[1] upon an alleged "accord" between "great concentrations of capital as represented by the life insurance companies and the savings banks" and the Commission, whereby senior bondholders are to appropri-

[1]Debtor's cross-petition, p. 8.

ate values belonging to junior debt and capital stock, should be faced squarely by this Court.[1] The Commission, in the spirit of this Court's decisions in the *Consolidated Rock Products* case, *supra*, and the *Los Angeles Lumber Products* case,[2] has, in the Western Pacific as well as in other railroad reorganization plans, refused to take from senior bondholders a part of the permissible reorganized capitalization in order to placate junior interests having no value other than nuisance value. Your petitioners believe it was the intent of this Court, by those two decisions, to eliminate such nuisance value as a factor in any reorganization. It is imperative, therefore, that this Court should promptly put an end to the now general misuse of the two decisions to create a nuisance value for junior interests against senior interests.[3]

3. The inconsistencies of procedural techniques, as well as of argument, between the Debtor's cross-petition, the ACJ brief, the WP Corp. brief, and the Refunding Mortgage Trustee's motion, might mislead this Court into the belief that it is dealing with four *bona fide* separate interests. In fact, these four inconsistent documents represent in substance *one* interest. The record establishes that the same interests which control ACJ also control WP Corp., which in turn controls 100% of the stock and the unsecured debt of the Debtor (R. 1030, 1051). ACJ, as

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[1]It is, of course, true that large amounts of senior railroad bonds are held by insurance companies and savings banks. The nature of their interest in these bonds, however, not only is as fiduciary for innumerable policyholders and depositors, but also is identical with that of the millions of scattered small holders of the same issues.

[2]308 U. S. 106 (1939).

[3]See Mr. Arthur Krock's column in N. Y. Times, January 8, 1942, p. 20, col. 5.

pledgee, is interested in a majority of the Refunding Mortgage Bonds objecting to the Commission Plan (R. 1053-8). It therefore in effect controls the action of the Refunding Mortgage Trustee. Your petitioners do not question the legal right of the James Interests thus to exhibit their split personality in this Court, as they have from the outset of the proceeding before the Commission and the courts below. However, this continued resort to a multiplicity of corporate entities is obviously primarily for the purpose of creating an appearance of confusion of issues and procedural problems as a basis for deferment of review by this Court. Such attempts to impede reorganization by inconsistent procedural techniques and arguments accentuates the public importance of final disposition by this Court of the Western Pacific reorganization and the many questions which it, in common with most other railroad reorganizations, involves. After being deprived of any income return for the past eight years, the First Mortgage Bondholders believe it is time that this Court forcefully demonstrate that "there is no occasion" for the Courts, the Commission, or the senior securityholders, "to yield to such pressures."[1]

Respectfully submitted,

ROBERT T. SWAINE,
Attorney for Petitioners.

HERBERT W. CLARK,
Of Counsel.

Dated: January 23, 1942.

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[1] *Case* v. *Los Angeles Lumber Products Co.*, *supra*, 308 U. S. at 129.

APPENDIX

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Nos. 7590, 7610-7617.

October Term, 1941, January Session, 1942.

In the Matter of CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC R.R. Co., *Debtor.*	On Motion to Modify Opinion

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January 12, 1942.

Before EVANS, and KERNER, *Circuit Judges*, and LINDLEY, *District Judge*.

PER CURIAM. We are asked to modify our opinion announced in this case, by striking therefrom three paragraphs, beginning with the words, "We are satisfied that the evidence supports the finding of the Commission," appearing on page 15 of the opinion, and ending with the words, "* * * which must be at the bottom of all reorganization plans."

Because counsel seemingly misunderstand our position upon the failure of the Commission to make necessary findings of value so as to allocate the new securities amongst existing bondholders and creditors, we deem it necessary, or at least advisable, to make our position clear.

It was, and is, our opinion that the I. C. C. made a sufficiently specific finding as to value of the equity represented by the common and preferred stock of the Debtor, so as to permit the court to intelligently review this issue, the determination of which is necessary to a disposition of the other questions presented by the reorganization plan.

On these other questions there was lacking the necessary findings by the I. C. C. to permit us to approve or disapprove of the value of the old securities and the value of the new securities, given in exchange for them.

Now, to make our position entirely clear, we add this memorandum and hold that the finding of the I. C. C. as to absence of value of old common and preferred stock, is specific, definite and certain, and fully meets the rule which requires finding on values of assets.

Second, we meant to hold, and do hold, that the evidence supports this finding, that there is no value to either the common or preferred stock of debtor. It follows that this branch of the case, the value of the equity of the debtor, evidenced by the common and preferred stock, is closed, and the I. C. C. need not further investigate or make further finding on this issue unless it is convinced that changed conditions in railroad earnings warrant it. In other words, the I. C. C. has jurisdiction of the matter and may, although it is not required to do so, re-examine the evidence, or receive additional evidence, if in its judgment, justice to the parties requires it.

The motion to amend the opinion is DENIED.

A true Copy:
Teste:

Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1942

Nos. 7, 8, 20, 33 and 61

IN THE MATTER
of
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Debtor.

FREDERICK H. ECKER, JOHN W. STEDMAN and REEVE SCHLEY, constituting the INSTITUTIONAL BONDHOLDERS' COMMITTEE,
Petitioners,

vs.

WESTERN PACIFIC RAILROAD CORPORATION, a corporation; A. C. JAMES CO., a corporation; THE RAILROAD CREDIT CORPORATION, a corporation; THE WESTERN PACIFIC RAILROAD COMPANY, a corporation; IRVING TRUST COMPANY, a corporation, as substituted Trustee under the General and Refunding Mortgage of Western Pacific Railroad Company; RECONSTRUCTION FINANCE CORPORATION; and CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under the First Mortgage of The Western Pacific Railroad Company, a corporation,
Respondents.

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, Trustees of the First Mortgage of The Western Pacific Railroad Company, a corporation, dated June 26, 1926,
Petitioners,

vs.

WESTERN PACIFIC RAILROAD CORPORATION, a corporation,
Respondent.

THE WESTERN PACIFIC RAILROAD COMPANY, a corporation,
Petitioner,

vs.

FREDERICK H. ECKER, *et al.*,
Respondents.

PETITION FOR REHEARING OF THE WESTERN PACIFIC RAILROAD COMPANY, DEBTOR, RESPONDENT, PETITIONER

FRANK C. NICODEMUS, JR.,
Counsel for The Western Pacific Railroad Company,
40 Wall Street,
New York, N. Y.

April 8, 1943.

Supreme Court of the United States

OCTOBER TERM, 1942

Nos. 7, 8, 20, 33 and 61

IN THE MATTER
of
THE WESTERN PACIFIC RAILROAD COMPANY, a corporation,
Debtor.

FREDERICK H. ECKER, JOHN W. STEDMAN and REEVE SCHLEY, constituting the INSTITUTIONAL BONDHOLDERS' COMMITTEE,
Petitioners,
vs.
WESTERN PACIFIC RAILROAD CORPORATION, a corporation; A. C. JAMES CO., a corporation; THE RAILROAD CREDIT CORPORATION, a corporation; THE WESTERN PACIFIC RAILROAD COMPANY, a corporation; IRVING TRUST COMPANY, a corporation, as substituted Trustee under the General and Refunding Mortgage of Western Pacific Railroad Company; RECONSTRUCTION FINANCE CORPORATION; and CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under the First Mortgage of The Western Pacific Railroad Company, a corporation,
Respondents.

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, Trustees of the First Mortgage of The Western Pacific Railroad Company, a corporation, dated June 26, 1926,
Petitioners,
vs.
WESTERN PACIFIC RAILROAD CORPORATION, a corporation,
Respondent.

THE WESTERN PACIFIC RAILROAD COMPANY, a corporation,
Petitioner,
vs.
FREDERICK H. ECKER, *et al.*,
Respondents.

PETITION FOR REHEARING OF THE WESTERN PACIFIC RAILROAD COMPANY, DEBTOR, RESPONDENT, PETITIONER

The Western Pacific Railroad Company, herein called the Debtor, respectfully applies to this Court, pursuant to

Rule 33 of the Revised Rules of this Court for a rehearing on the following grounds:

I.

This Court appears to have overlooked the fact that as the result of its own decision establishing the lien priority of the First Mortgage upon the Debtor's estate (except as to relatively unimportant unmortgaged assets and items pledged under the General and Refunding Mortgage) it has created in this case the same situation as in the companion case of Chicago, Milwaukee, St. Paul and Pacific Railroad Company was held by this Court to require that the proceeding be referred back to the Interstate Commerce Commission to determine and fix the compensation due from the junior lienors to the holders of First Mortgage Bonds for their sacrifices under the Plan. Here, as there, "a large amount of new common stock" is given to the junior lienors in respect of their "claims upon the mortgaged assets" while the holders of First Mortgage Bonds secured by a paramount lien upon the same "mortgaged assets" are "to receive under the plan only a face amount of inferior securities equal to the face amount of their claims." Under the companion case, however, they "must receive in addition compensation for the senior rights which they are to surrender." (All quotations are from the contemporaneous Opinion of Mr. Justice DOUGLAS in the matter of the reorganization of Chicago, Milwaukee, St. Paul and Pacific Railroad Company.) While it is true that the new common stock is allotted to holders of First Mortgage Bonds at $57 per share and to a junior creditor at $62 per share, this differential is too slight even to be considered as compensation for the sacrifices of the senior lienors. For these reasons it is submitted that this Court

should modify its decision herein so that the cause will be remanded to the District Court with the same direction as to a determination and finding as to the compensation due the senior lienors as is given in the case of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

II.

This Court in approving as not legally unwarranted or unduly discriminatory the preferential treatment accorded Reconstruction Finance Corporation has apparently *assumed*, but without searching the record for supporting evidence, that Reconstruction Finance Corporation had in fact given a commitment to purchase $10,000,000 principal amount of new First Mortgage Bonds at par or to exchange $10,000,000 principal amount of Trustees' Certificates for a like amount of new First Mortgage Bonds. A present willingness of Reconstruction Finance Corporation to purchase these new First Mortgage Bonds at par which may be a price well below what could be obtained under prevailing market conditions is not evidence of a prior commitment to purchase at that price regardless of market conditions at the time of purchase and may not be a lawful consideration to support the treatment proposed for the favored creditor. Since the record is silent upon this critical point the cause should it is submitted be remanded to the District Court for reference back to the Interstate Commerce Commission for either (a) a specific finding supported by substantial evidence that such a commitment had been made and has been kept good by Reconstruction Finance Corporation or (b) a modification of the Plan to conform the treatment of Reconstruction Finance Corporation to what is justifiable by its junior collateral position.

III.

This Court did not itself determine that economic changes since closing of the hearings in the Interstate Commerce Commission or the hearing in the District Court are not of such significance as in equity and good conscience to require that the Plan be recommitted to the Interstate Commerce Commission—all that this Court held, as we interpret the Opinion, is that the increased earnings since the hearing in the District Court do not necessarily lead to a rejection of the Commission's Plan by the appellate Courts. It does not follow, however, that a proper analysis of these vastly increased earnings supported by expert opinion would not establish many permanent accretions to earning power which would require a complete reappraisal of past, present and prospective earning power. It is submitted therefore that this cause should be remanded to the District Court without prejudice to its right to receive further evidence or to refer the proceeding back to the Interstate Commerce Commission to take further evidence as to the value of the Debtor's railway properties in the light of changed economic conditions.

IV.

This Court apparently holds that Congress intended to invest the Interstate Commerce Commission with power "to select the date for the institution of the reorganization." This is based upon the broad language of subsection (b). It is submitted, however, that subsection (l) inserted at a later point in the statute clearly fixes all rights as of the date of the filing of the Petition and should under established rules of construction be given effect as expressly limiting

the general language of the earlier subsection to which this Court refers.

Upon each of the foregoing grounds the Debtor respectfully asks that this Court grant a rehearing and remand this cause to the District Court for further proceedings.

Respectfully submitted,

FRANK C. NICODEMUS, JR.,
Counsel for The Western Pacific Railroad Company,
40 Wall Street,
New York, N. Y.

April 8, 1943.

Certificate of Counsel

I, FRANK C. NICODEMUS, JR., counsel herein for The Western Pacific Railroad Company, Debtor, Respondent and Petitioner, hereby certify that the foregoing petition was prepared by me and that I am of the opinion that the petition is well founded in point of law and is not interposed for purposes of delay.

Dated at New York, New York, this 8th day of April, A. D. 1943.

FRANK C. NICODEMUS, JR.